

**THE STATE OF NEW HAMPSHIRE**  
**SUPREME COURT**

**In Case No. 2005-0184, J. Albert Lynch, Jr. & a. v. Town of Pelham, the court on December 9, 2005, issued the following order:**

The petitioners, J. Albert Lynch, Jr. and Mary Farm Trust, appeal an order of the trial court affirming the decision of the Town of Pelham Planning Board (board) to approve a subdivision application submitted by the intervenor, Sousa Realty and Development Corporation (Sousa). They contend that the trial court erred in: (1) failing to consider a Pelham health ordinance; (2) finding the subdivision plan to be lawful and reasonable where no evidence was submitted that Lawrence Corner Road was properly closed; and (3) approving the plan despite the board's failure to follow an earlier order of the trial court. We affirm.

Superior court review of planning board decisions is limited. See Summa Humma Enters. v. Town of Tilton, 151 N.H. 75, 79 (2004). The superior court is required to treat the factual findings of the planning board as prima facie lawful and reasonable and cannot set aside its decision absent unreasonableness or an identified error of law. Id.

The petitioners first argue that the trial court erred in failing to consider a Pelham health ordinance. The board first held a hearing on Sousa's application in 2001; the board also held hearings on the application in 2004 following remand from the superior court. When the petitioners appealed to the superior court in 2004, they did not cite this ordinance in their petition and did not seek to add it to the record until three days before the October 29, 2004 trial management conference, despite the statement in the September 14, 2004 scheduling notice that all pretrial motions "shall" be filed at least ten days prior to the conference. Given the 1977 date of adoption of the ordinance, the length of the ongoing litigation, the failure to raise this issue before the board and the notice provided to the petitioner in the scheduling order, we find no error in the trial court's denial of the petitioners' request to supplement the record. See id. at 80 (trial court's prerogative to determine whether admission of further evidence would advance justice or judicial economy; absent unsustainable exercise of discretion, its decision will not be reversed).

The petitioners next contend that the trial court erred in finding the subdivision plan to be lawful and reasonable despite the absence of any evidence that Lawrence Corner Road was "properly closed." In a 2004 order, the trial court found that this issue had been raised in the earlier litigation that had culminated in a 2003 order remanding the case to the board. The record before us reflects that the board did not require a new application upon remand but rather considered Sousa's pending application. We have not been

provided with a record of the earlier proceedings before the board. See Bean v. Red Oak Prop. Mgmt., 151 N.H. 248, 250 (2004) (burden of appealing party to provide this court with sufficient record to decide issues on appeal). The absence of this record coupled with the burden placed upon the appealing party in an appeal from a planning board decision compels our conclusion that the decision of the trial court should be affirmed. See Summa Humma Enters., 151 N.H. at 79 (noting deferential review of planning board decisions and subsequent superior court review required by statute).

The petitioners also contend that the board failed to follow the earlier remand order of the superior court. Specifically, they argue that the board erred in failing: (1) to review a proposed right of way to their property; and (2) to consider whether the right of way complied with town subdivision regulations. We have reviewed the record before us and find no indication that the board failed to consider the proposed right of way. Nor have we found any indication that any party presented evidence to the board that the proposed right of way violated town subdivision regulations.

Affirmed.

BRODERICK, C.J., and NADEAU and DUGGAN, JJ., concurred.

**Eileen Fox,  
Clerk**